UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

B.I.P. CORPORATION, Plaintiff, vs. MITECH TELECOM, INC., and DOES 1 to 30, Defendants.	CASE NO. 08-CV-0313-H (CAB) ORDER DENYING MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

On July 7, 2008, Mitech Telecom, Inc. ("Defendant") filed a motion to dismiss the Second Amended Complaint. (Doc. No. 9.) B.I.P. Corporation ("Plaintiff") filed a response in opposition on July 24, 2008. (Doc. No. 10.) On August 1, 2008, Defendant filed its reply brief. (Doc. No. 11.) The Court exercises its discretion under Local Civil Rule 7.1(d)(1) to submit the motion on the papers without oral argument. For the reasons set forth below, the Court denies the motion to dismiss.

Background

I. General Background

On February 19, 2008, Defendant removed this case from the Superior Court of California in San Diego based on diversity jurisdiction. (Doc. No. 1.) Plaintiff filed a First Amended Complaint ("FAC") on March 19, 2008. (Doc. No. 4.) On May 22, 2008, the Court granted Defendant's motion to dismiss the FAC, to which Plaintiff did not file an opposition. (See Order Granting Mot. Dismiss, Doc. No. 7.) Plaintiff filed a Second Amended Complaint ("SAC") on June 20, 2008. (Doc. No. 8.) The Court summarizes the allegations as set forth in the SAC, and the Court's order of March 11, 2008, granting Defendant's request for judicial notice. (See Order Granting Def.'s Request Judicial Notice Supp. Notice Removal ("Order on RJN"), Doc. No. 3.)

Defendant is a Canadian corporation qualified to do business in California, with its principle North American office in Quebec. (SAC ¶ 1; Order on RJN.) Plaintiff is a California entity with its primary office in San Marcos, California. (SAC ¶ 2.) Plaintiff is in the business of purchasing and reselling telecommunications equipment, and Defendant was Plaintiff's sole supplier of high powered transceivers. (SAC ¶¶ 5-6.) Plaintiff's claims are based, at least in part, on transactions that took place between the parties in San Marcos, California. (SAC ¶ 3.)

II. Overview of Defective Product Allegations

On or about July 25, 2006, the parties entered into a written "bill and hold agreement" under which Plaintiff would purchase products to be stored in Defendant's warehouse in a space dedicated for Plaintiff's purchases, from which they could be shipped directly to Plaintiff's customers. (SAC ¶ 14.)[1] Plaintiff identifies the specific agents who executed the agreement. (SAC ¶ 14.) Plaintiff also describes relveant terms of the agreement including: (1) that Defendant would be responsible for retrofitting or exchanging defective products; and (2) on all "VSAT" products, Defendant would provide a 24 month warranty, extended to 29 months if the product were held in Defendants warehouse for at least two months. (SAC ¶ 15-16.) Neither party has provided a complete copy of the alleged contract. Plaintiff performed substantially all of its obligations under the bill and hold agreement, including the purchase of approximately $5 million in Defendant's products. (SAC ¶ 89.)

On or about October 24, 2006, the parties met in San Marcos and negotiated an increase in sales to Plaintiff. (SAC ¶ 17.) In 2007, Plaintiff issued purchase orders to

[1] Since the SAC frequently repeats the same or similar allegations in several places, the Court offers these citations to the SAC merely as examples.

Defendant totaling approximately $3.5 million. (SAC ¶ 18.) From around December, 2006, to January, 2007, Defendant shipped equipment to Plaintiff's customers with a defect rate of approximately 50%. (SAC ¶ 19.) On or about January 8, 2007, Defendant's vice president of sales met with Plaintiff's CEO regarding the defects and admitted knowing that the equipment shipped to Plaintiff's customers was defective. (SAC ¶ 20-21.) Around May, 2007, Plaintiff demanded a recall to ensure that its purhcases were free of defects. (SAC ¶ 22.) On or about June 6, 2007, Defendant's sales manager sent an allegedly false email stating that the process of recalling and reworking repaired products was complete. (SAC ¶ 23, 44-46.) Plaintiff identifies the employee by name and provides a verbatim quote from the alleged email. (SAC ¶ 23.) Defendant's CEO also stated, on or about August 19, 2007, that all units in question had been recalled, tested, and were confirmed to work properly. (SAC ¶ 24.) In June, 2007, Plaintiff asked that the remaining products stored in Defendant's warehouse be shipped to Plaintiff's San Marcos location. (SAC ¶ 26.)

III. Overview of Customer List Allegations

From January, 2003, to June, 2007, Plaintiff cultivated an economic relationship with more than 100 customers. (SAC ¶ 64.) Sales to some customers often reached $100,000 per year. (SAC ¶ 64.) Plaintiff maintained a list of its customers that was the result of a substantial investment of time, energy, and money. (SAC ¶ 27.) Plaintiff protected its list by providing the information only to employees, vendors, and suppliers who needed to know, and then only after signing a confidentiality agreement. (SAC ¶ 28.)

On or about June 2, 2005, the parties met in San Marcos and entered into a written non-disclosure agreement. (SAC ¶ 9.) Plaintiff identifies the specific agents entering into the agreement. (SAC ¶ 9.) The agreement was part of Plaintiff's routine practice of protecting proprietary customer information. (SAC ¶ 8.) Plaintiff identifies certain verbatim terms of the agreement, including a requirement that each party would not use the other's confidential information for its own purposes, though neither party has provided a complete copy of the alleged contract. (SAC ¶ 11-13.)

After the confidentiality agreement was in place, Plaintiff disclosed customer information to Defendant so that Defendant could ship products directly from the dedicated warehouse space to Plaintiff's customers. (SAC ¶ 30.) Beginning around May, 2007, Defendant began using this information to solicit business from Plaintiff's customers. (SAC ¶ 32-34.) Plaintiff contacted Defendant to protest this perceived violation of the confidentiality agreement. (SAC ¶ 35.) In May, 2007, Defendant's vice president of sales requested Plaintiff's customer list, promising that it would use the list to ensure that it did not compete with Plaintiff. (SAC ¶ 36.)

Upon receiving the list, however, Defendant began using the information to continue soliciting business from Plaintiff's customers at lower prices. (SAC ¶ 39.) Simultaneously, Defendant unilaterally cancelled warranties on equipment sold by Plaintiff to these same customers. (SAC ¶ 39.)

As a result of these allegations involving defective products and the misappropriated customer list, Plaintiff asserts five causes of action: (1) misappropriation of trade secrets; (2) fraud and deceit; (3) intentional interference with prospective economic relations; (4) breach of contract; and (5) breach of the covenant of good faith and faith dealing. As a result of the defects, cancelled warranties, and competition from Defendant, Plaintiff was unable to sell equipment which, in good working condition, would have been worth approximately $2 million. (SAC ¶¶ 25, 40.) Plaintiff seeks damages resulting from inability to resell the defective equipment, lost future sales, and lost profits. (SAC ¶ 40.) Plaintiff seeks additional remedies including attorneys fees, exemplary damages, and punitive damages.

Discussion

I. Legal Standard for Rule 12(b)(6) Motion

Defendant challenges each of Plaintiff's causes of action for failure to state a claim. Rule 12(b)(6) permits dismissal of a claim either where that claim lacks a cognizable legal theory, or where insufficient facts are alleged to support the claim's theory. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).

While a claim does not need detailed factual allegations to survive a motion to dismiss, a party's obligation to provide the grounds of its entitlement to relief requires "more than labels and conclusions" or a "formulaic recitation of the elements of a cause of action." See Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007). Rather, to survive a motion to dismiss pursuant to Rule 12(b)(6), factual allegations must be sufficient, when taken as true, to raise a right to relief above the speculative level. Id. at 1965. A complaint may proceed even though proof seems improbable or recovery is very remote and unlikely. Id.

II. Misappropriation of Trade Secrets

Defendant argues that Plaintiff fails to adequately allege that its customer list is a trade secret. Under California law, which is based on the Uniform Trade Secrets Act, a trade secret must both: (1) derive "independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use;" and (2) be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Cal. Civ. Code § 3426.1(d). The Court concludes that Plaintiff's allegations meet both elements.

First, Plaintiff adequately alleges that its customer list derived independent economic value from not being generally known. California courts have recognized that a customer list may meet this first prong where the list required significant effort to create and includes more than a mere list of customers who could be easily identified. See, e.g., Morlife, Inc. v. Perry, 56 Cal. App. 4th 1514, 1521-22 (1997) ("[A] customer list can be found to have economic value because its disclosure would allow a competitor to direct its sales efforts to those customers who have already shown a willingness to use a unique type of service or product as opposed to a list of people who only might be interested.") Plaintiff alleges that his customer list required significant effort to develop, following several years of customer contact. (SAC ¶¶ 27, 64.) Plaintiff also alleges that the identities of at least some of its customers were not generally known. (SAC ¶ 28.)

Furthermore, the Court concludes that Plaintiff adequately alleges efforts to maintain secrecy that were reasonable under the circumstances. Plaintiff alleges that information in the list was only provided to employees, vendors, and suppliers who needed to know, and then only after signing a confidentiality agreement. (SAC ¶ 28.) Disclosure on a "need to know" basis may be a reasonable effort to maintain secrecy, depending on the circumstances. Courtesy Temp. Serv., Inc. v. Camacho, 222 Cal. App. 3d 1278, 1288 (1990). Furthermore, Plaintiff alleges that it disclosed information to Defendant only after entering into a written confidentiality agreement. See, e.g., Whyte v. Schlage Lock Co., 101 Cal. App. 4th 1443, 1454-55 (2002) (noting that confidentiality agreements may be a reasonable step to ensure secrecy).

The fact that Plaintiff does not attach the actual written agreements is not fatal to his claims. Plaintiff describes the terms of the confidentiality agreements with reasonable specificity and provided the exact language of certain relevant terms. Drawing the favorable inferences appropriate at this early stage of the proceedings, Plaintiff adequately alleges reasonable efforts to maintain secrecy. In summary, Plaintiff adequately pleads a cause of action for trade secret misappropriation.

III. Fraud and Deceit

Under Rule 9(b), a party must plead the circumstances constituting fraud with particularity, except any required mental state, which a party may plead generally. Fed. R. Civ. P. 9(b). If a fraud claim is not pled with sufficient particularity, a court may dismiss it for failure to state a claim. See Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir. 2001). Allegations of fraud must include the "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (quoting Edwards v. Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004)).

The Court previously concluded that Plaintiff's allegations did not provide sufficient detail to meet the Rule 9(b) pleading standard. In his amended complaint, Plaintiff provides additional details about the specific individuals involved and the timing and content of the allegedly fraudulent misrepresentations. For example, Plaintiff offers a direct quote from an alleged email, identified by the date and sender's name. (SAC ¶ 23.) The amended allegations meet the requirements of Rule 9(b).

Defendant also argues that the allegedly fraudulent statements are merely opinion or "puffing" about a seller's product, and therefore not the proper basis of a fraud claim. See, e.g., Hauter v. Zogarts, 14 Cal. 3d 104, 111 (1975); Wilke v. Coinway, 257 Cal App. 2d 126, 136 (1967). The Court disagrees. The allegedly fraudulent statements go beyond mere opinion or puffery. For example, Plaintiff alleges that Defendant knowingly misrepresented whether it had tested and repaired equipment that was actually shipped "dead on arrival" due to failed power supplies. (SAC ¶ 47.) Plaintiff adequately pleads a claim for fraud and deceit.

IV. The Contract and Covenant Claims

Defendant argues that the Court should dismiss the claims for breach of contract and breach of the implied covenant of good faith and fair dealing because the SAC does not describe the contract terms in sufficient detail. The Court concludes that the allegations are sufficient to survive the motion to dismiss. Defendant concedes that it is not necessary to attach the actual written contract, provided that the Plaintiff alleges the substance of the relevant terms. See, e.g., Perry v. Robertson, 201 Cal. App. 3d 333, 341 (1988). Plaintiff sufficiently describes the substance of relevant contract terms, such as the agreement not to disclose or use customer information, the warehousing provisions, and the product warranty terms. (E.g. SAC ¶¶ 85-89.)

Defendant also argues that Plaintiff's claim for breach of the covenant of good faith and fair dealing sounds in tort rather than contract law, and is thus prohibited under California law. In the Court's view, however, the claim does not sound in tort, and Plaintiff's opposition brief confirms that it does not seek tort remedies.

V. Intentional Interference with Prospective Economic Relations

Defendant's challenge to the intentional interference claim is linked to its challenge to the misappropriation claim. Without the alleged misappropriation, Defendant argues, there can be no intentional interference with prospective economic relations. Since the Court denies Defendant's motion with regard to the misappropriation claim, it also denies it with regard to the interference claim.

Conclusion

For the reasons set forth above, the Court DENIES Defendant's motion to dismiss. Defendant may file an answer within 30 days of the date this order is filed.

IT IS SO ORDERED.

DATED: August 7, 2008

MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT

COPIES TO:
All parties of record.